May, 1994

HONOR ROLL

413th Session, Basic Law Enforcement Academy - January 3 through March 25, 1994

President:	*Officer Gary L. Wolfe - Seattle Police Department*
Best Overall:	*Officer Jonathon Z. Lively - Mount Vernon Police Department*
Best Academic:	*Officer Stephen M. Crane - Seattle Police Department*
Best Firearms:	*Officer Thomas C. Song - Seattle Police Department*

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Corrections Officer Academy - Class 193 - March 7 through April 1, 1994

Highest Overall:	*Officer Christina Shanklin - Washington Corrections Ctr for Women*
Highest Academic:	*Officer Darrell M. Pilat - Renton Police Department*
Highest Practical Test:	*Officer Christina Shanklin - Washington Corrections Ctr for Women*
Highest in Mock Scenes:	*Officer Wendy J. Williams - Coyote Ridge Correctional Center*
	Officer Dennis W. Harmon - Twin Rivers Corrections Center
Highest Defensive Tactics:	*Officer Carl P. Windle - Clallam Bay Corrections Center*

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Corrections Officer Academy - Class 194 - March 7 through April 1, 1994

Highest Overall:	*Officer Jeffrey A. Willard - Skagit County Jail*
Highest Academic:	*Officer Patricia G. Walters - Pine Lodge Pre-Release*
	Officer Robin L. Otto - Snohomish County Corrections
Highest Practical Test:	*Officer Patricia G. Walters - Pine Lodge Pre-Release*
	Officer Jeffrey A. Willard - Skagit County Jail
	Officer Eric W. Nicklin - Washington State Reformatory
	Officer David P. Shepherd - Twin Rivers Corrections Center
	Officer Victor T. Barbeau - McNeil Correctional Center
Highest in Mock Scenes:	*Officer Jeffrey A. Willard - Skagit County Jail*
Highest Defensive Tactics:	*Officer Jeffrey A. Willard - Skagit County Jail*

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CORRECTION NOTICE -- REAL PROPERTY FORFEITURE

In the March 1994 LED entry on U.S. v. Good, 54 CrL 2009 (1993) at pages 2-3, your LED Editor stated what we now believe to be an erroneous conclusion as to the ramifications of the Good decision. Contrary to our statement at page 3 of the March 1994 LED, there are strong arguments: (1) that Good is not inconsistent with the Washington State Supreme Court decision in the Tellevik case (see 120 Wn.2d 68 (1992) Jan. '93 LED:08), and (2) that Good does not mean that Washington agencies will be required to provide probable cause hearings before initiating "seizure" proceedings under the Washington statute.

Our apologies for not reading the Tellevik and Good cases more carefully and for not checking with those in the Attorney General's Office who specialize in this subject area. We simply did not fully understand the clear differences between: (A) the Washington real property forfeiture statute as interpreted in the Tellevik case at 120 Wn.2d 68 and (B) the federal real property forfeiture scheme addressed in Good. Language in the U.S. Supreme Court opinion in Good allows a pre-hearing seizure scheme like Washington's which is not as drastic in its seizure mechanism as the Federal statute.

For more information and legal briefing on this issue, readers may contact Assistant Attorney General, Fred Caruso -- Phone (206) 586-7844, FAX (206) 586-8474.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

ADMINISTRATIVE SEARCH WARRANTS OR OTHER SEARCH WARRANTS BASED ON LESS THAN PROBABLE CAUSE CANNOT BE ISSUED BY COURTS ABSENT EXPRESS STATUTORY AUTHORIZATION -- In City of Seattle v. McCready, 123 Wn.2d 260 (1994) the State Supreme Court is unanimous in ruling invalid the City of Seattle's proactive "residential housing inspection program." The Seattle inspection program allowed judges to issue administrative inspection warrants for housing, with warrant issuance based on a three-factor "predictive model" using: (a) building age, (b) assessed value per unit and (c) number of code violations in past five years. Warrant issuance was not based on probable cause as to possible violations. The Seattle housing inspection scheme was created by the City of Seattle in the absence of any express statutory authorization.

The State Supreme Court declares that the privacy protections of article 1, section 7 of the Washington Constitution do not allow a judge to issue a search warrant (or other authorization for a privacy intrusion) on less than probable cause unless express state legislation authorizes a warrant under such circumstances. Moreover, the Court declares, even if a statute expressly authorizes issuance of a warrant on less than probable cause, the statute will be reviewed by the Washington courts to determine whether it is objectively reasonable from a privacy perspective.

The Court notes that several Washington statutes do authorize warrant issuance on less than probable cause, and the Court appears to approve of those statutory schemes. Those other statutes include the following: RCW 15.09.070 and 17.24.021 (allowing for warrant issuance on less than probable cause for horticultural officials to inspect premises for horticultural pests and diseases); RCW 69.50.502 (allowing for warrant issuance for administrative inspections of pharmaceutical premises -- statute purports to be based on a "probable cause" standard, but this standard is satisfied by an affidavit merely "showing a valid public interest in the effective enforcement of this chapter or rules hereunder, sufficient to justify administrative inspection of the area, premises, building or conveyance in the circumstances specified in the application for the warrant; . . ."') and RCW 19.94.260 (allowing warrant issuance for "weights and measures" inspections of business premises on less than probable cause).

Result: reversal of King County Superior Court decisions upholding the constitutionality of the program and issuing warrants; the housing inspection warrants issued by the lower court are quashed because the court had no authority to issue them.

LED EDITOR'S COMMENT: In last month's LED at pages 7-8, in our comments on the Young decision regarding thermal detection devices, we stated our belief that the McCready decision is authority against issuance of search warrants for infrared thermal detection devices on less than probable cause. That is because no statute expressly authorizes issuance of warrants under such a standard. In our same comments last month, however, we also stated our belief, based in part on McReady, that constitutionally "reasonable" legislation could be drafted to allow issuance of "thermal detection" warrants on less than probable cause.

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WASHINGTON STATE COURT OF APPEALS

SHOWING FALSE ID TO OFFICER, KNOWING FALSITY OF ID, IS "FORGERY"

State v. Esquivel, 71 Wn. App. 868 (Div. III, 1993)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> A. State v. Esquivel. On January 23, 1992, a Washington State Patrol trooper stopped a vehicle with a defective headlight. In response to a request for information, the driver produced an alien registration card and a Social Security card bearing the name Ramiro M. Esquivel. The trooper had reason to believe the cards were not authentic. Mr. Esquivel was charged with two counts of forgery. RCW 9A.60.020(1)(b).
>
> Mr. Esquivel moved to dismiss both charges, contending he had no intent to

defraud the trooper. He stipulated that the cards were not authentic, but they contained his correct name and,in the case of the registration card, his correct birthdate and signature. The trial court granted his motion to dismiss and the State timely appealed.

B. State v. Luna. On December 29, 1991, an Okanogan County Sheriff's deputy was investigating a possible trespass. He asked one of the persons at the scene for identification. Mr. Luna produced a temporary resident alien card which, although not authentic, correctly identified Mr. Luna by name, date of birth, signature and photograph. Mr. Luna told the deputy he purchased the card in California for $20.

The State moved for an arrest warrant charging Mr. Luna with one count of forgery. The trial court entered an order refusing to find probable cause.

ISSUE AND RULING: Was there sufficient evidence to prosecute Esquivel and Luna for forgery? (ANSWER: Yes) Result: Okanogan County Superior Court rulings that forgery could not be charged reversed; cases remanded, apparently for trial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

RCW 9A.60.020(1)(b) provides, in relevant part:

> A person is guilty of forgery if, with intent to injure or defraud:
> . . .
> (B) He possesses, utters, offers, . . . or puts off as true a written instrument which he knows to be forged.

A "written instrument" is defined to include any paper or document containing written or printed matter. RCW 9A.60.010(1).

(a) False Documents. Forgery does not involve the making of false entries in an otherwise genuine document. It does involve the manufacture **[or possessing, uttering, offering or putting off as true -- LED Ed.]** of a false or spurious document made to appear to be other than what it actually is. . . .

Mr. Luna and Mr. Esquivel fail to distinguish between false statements in a document and a false document. Since they conceded the falsity of the documents, the fact that true statements appeared on those documents is not fatal to the State's forgery case.

(b) Intent To Defraud. The trial court appeared to base its decisions on the State's inability to prove intent to defraud. However, intent to commit a crime may be inferred from surrounding facts and circumstances if they "plainly indicate such an intent as a matter of logical probability:. . . . As stated in 1 C. Torcia, Wharton on Criminal Evidence § 81, at 265-66 (14th ed. 1085):

> The unexplained possession and uttering of a forged instrument . . . raises an inference, or a rebuttable presumption, is strong evidence or is

> evidence, or makes out a prima facie case of guilt of forgery of the possessor.

(Footnotes omitted.)

> Forgery does not require that anyone be actually defrauded.
>
> Here, the false instruments contained the names of defendants. In the case of the registration cards, their photographs and signatures appeared on them. As a matter of logical probability, intent to defraud could be inferred from such facts and circumstances. Indeed, the instruments' only value would be to falsely represent the defendants' right to legally be in this country. By showing the cards to the officers, they misrepresented their legal status, even though they did not misrepresent their legal names and other details about them. Their intent to defraud the specific officers is not required. RCW 10.58.040 states:
>
> > Whenever an intent to defraud shall be made an element of an offense, it shall be sufficient if an intent appears to defraud any person, association or body politic or corporate whatsoever.
>
> The trial court erred when it determined, as a matter of law, that the State could not prove forgery.

[Some citations and footnotes omitted]

OFFICER'S SUMMARY REPORT SATISFIES IMPLIED CONSENT STATUTE

Broom v. DOL, 72 Wn. App. 498 (Div. I, 1994)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> Stanley P. Broom, Gary L. Aichlmayr, Ryszard Matuszewski and Douglas C. Mitchell were arrested during 1991 in King County for driving while under the influence of intoxicating liquor. The arresting officers followed the same procedure in each case. At the police station, the drivers were asked a series of questions from a prepared form and then given the following implied consent warning:
>
> > Warning: You are under arrest for driving a motor vehicle while under the influence of intoxicating liquor. Further, you are now being asked to submit to a test of your breath which consists of two separate samples of your breath, taken independently, to determine alcohol content. You are now advised that you have the right to refuse this breath test; that if you refuse, your privilege to drive will be revoked or denied by the Department of Licensing; and that you have the right to additional tests administered by a qualified person of your own choosing and that your refusal to take the test may be used in a criminal trial.
>
> Each driver refused to submit to a breath test. The arresting officers then recorded the refusal on a "Report of Request to Submit to Breath/Blood Test" (hereinafter report) form, which set forth the warnings given to the drivers in summary

language.

> The reports were forwarded to DOL, which revoked the driver's license in each case. The drivers requested and received administrative hearings. In each case, the hearing officer sustained the license revocation. The drivers appealed the revocations to the King County Superior Court where, in de novo hearings at which the arresting officers testified, the court upheld the license revocations in Broom's, Aichlmayr's and Matuszeski's cases. In Mitchell's case the court granted his motion to dismiss and entered an order reinstating his driving privileges.

[Footnote omitted]

ISSUE AND RULING: Does the use of summary language in a report in setting forth the implied consent warning given to a driver arrested for driving while under the influence of intoxicating liquor impair the jurisdiction of DOL to institute revocation proceedings under RCW 46.20.308? (ANSWER: No) Result: King County Superior Court: (a) decisions upholding DOL licensing revocations as to Broom, Aichlmayr, and Matuszewski affirmed; and (b) decision reinstating license of Mitchell reversed; Mitchell's case remanded for trial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> RCW 46.20.308(6) provides:
>
> > The department of licensing, upon the receipt of a sworn report of the law enforcement officer that the officer had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor and that the person had refused to submit to the test or tests upon the request of the law enforcement officer *after being informed that refusal would result in the revocation of the person's privilege to drive*, shall revoke the person's license or permit to drive or any nonresident operating privilege.
>
> [Court's emphasis.] The reports submitted by officers to DOL contain the following language:
>
> > The aforementioned individual was requested to submit to a breath/blood test and *informed of the consequences of refusal and his/her rights under RCW 46.20.308.*
>
> [Court's emphasis.]
>
> The drivers maintain that, because a sworn police report is a jurisdictional prerequisite of DOL's authority to revoke a driver's license, strict compliance with the wording of the statute is required and the language used in these reports is inadequate to confer jurisdiction on DOL. DOL argues that the omission of the precise statutory language does not deprive it of jurisdiction.
>
> A sworn officer's report is a jurisdictional prerequisite to DOL's power to revoke a driver's license. The use of the report is limited to establishing DOL's jurisdiction; it

> may not be offered into evidence to prove substantive facts. The report has no relevance at all in the superior court's de novo review of the revocation. All issues contained in the report, including the issue of whether the driver was given the appropriate warning, must be proved by DOL whenever an administrative hearing is requested.
>
> The extent to which a report must comply with the precise statutory wording of RCW 46.20.308 has been considered in other cases. . . . **[Court of Appeals' discussion of prior cases omitted. LED Ed.]** . . .
>
> We hold that it is the existence of a certified report, not its contents, that confers jurisdiction on DOL and that the use of summary language in a report is adequate, so long as it sets forth the information required by RCW 46.20.308(6). In holding that the contents of a report are not the basis of DOL's jurisdiction, we do not suggest that a report containing a significant variation from or an omission of the information required under RCW 46.20.308(6) would be adequate to confer jurisdiction. We hold only that the use of summary language will not defeat jurisdiction where the summary language accurately conveys the information required under the statute.

[Text, footnotes and citations omitted.]

NO CUSTODIAL ARREST MERELY FOR DRIVING WITHOUT VALID OPERATOR'S LICENSE

State v. Terrazos, 71 Wn. App. 873 (Div. III, 1993)

Facts and Proceedings:

A Washington State Patrol trooper stopped a vehicle for a traffic violation. After learning that the driver was unlicensed, the trooper asked for the driver's name and birthdate; however, the trooper did not try to corroborate this information by having the dispatcher run a computer check on the name given, "Juan Sandoval", or on the vehicle.

The trooper did not ask the suspect any questions regarding his place of residence or his ties to the community. Instead, the trooper, believing that the suspect had given a false name, arrested him by searching him and placing him in the back seat of the trooper's patrol car.

The trooper then decided to search the arrestee's vehicle. After removing two passengers from the vehicle, the trooper searched the passenger area of the vehicle, finding a loaded .357 magnum pistol in the back seat and also finding a brick of cocaine wrapped in plastic bags and aluminum foil in the hatchback area.

The driver was ultimately identified as Juan Terrazas. He and the back seat passenger were charged with (1) possession of a controlled substance with intent to deliver, and (2) with conspiracy to deliver a controlled substance. The trial court granted the defendants' motions to suppress the evidence and dismissed the charges.

ISSUE AND RULING: Was Terrazas lawfully subjected to a custodial arrest such that the search of the vehicle's passenger area was justified as a search incident to lawful arrest? (ANSWER:

No, a custodial arrest was not justified.) Result: Yakima County Superior Court order suppressing evidence and dismissing charges affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Although State v. Reding, 119 Wn.2d 685 (1992)**[Dec. '92 LED:17]** involved reckless driving, a more serious violation, the Supreme Court discussed the evolution of the law regarding custodial arrests for minor traffic offenses. [In Reding the] court begins its discussion with its holding in State v. Hehman, 90 Wn.2d 45 (1978). Reding and Hehman prohibited custodial arrests for minor traffic violations unless the officer had "other reasonable grounds apart from the minor traffic violation itself." The court [in Reding] noted that the year after Hehman was decided the Legislature decriminalized most traffic offenses and amended RCW 46.64.015 and RCW 10.31.100. The intent of the Legislature in making these amendments was to codify the court's ruling in Hehman.
>
> RCW 46.64.015 and RCW 10.31.100 now control when an officer may make a custodial arrest for traffic violations. RCW 46.64.015 governs the issuance of citations:
>
> > Whenever any person is arrested for any violation of the traffic laws or regulations which is punishable as a misdemeanor or by imposition of a fine, the arresting officer may serve upon him or her a traffic citation and notice to appear in court. . . . The detention arising from an arrest under this section may not be for a period of time longer than is reasonably necessary to issue and serve a citation and notice, except that the time limitation does not apply under any of the following circumstances:
> >
> > (1) Where the arrested person refuses to sign a written promise to appear in court as required by the citation and notice provisions of this section;
> >
> > (2) Where the arresting officer has probable cause to believe that the arrested person has committed any of the offenses enumerated in RCW 10.31.100(3), as now or hereinafter amended;
> >
> > (3) Where the arrested person is a nonresident and is being detained for a hearing under RCW 46.64.035.
>
> RCW 10.31.100 addresses when an officer may make an arrest [for a traffic misdemeanor] without a warrant:
>
> > A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, except as provided in subsections (1) through (8) of this section.
> >
> > . . .
> >
> > (3) Any police officer having probable cause to believe that a person has

committed or is committing a violation of any of the following traffic laws shall have the authority to arrest the person:

Driving without a license is not among the traffic violations listed in RCW 10.31.100(3). **[LED EDITOR'S NOTE: The traffic crimes listed in RCW 10.31.100(3) for which custodial arrest is lawful per se (i.e., without additional justification) are:**

(a) RCW 46.52.010, relating to duty on striking an unattended car or other property;
(b) RCW 46.20.020, relating to duty in case of injury to or death of a person or damage to an attended vehicle;
(c) RCW 46.61.500 or 46.61.530, relating to reckless driving or racing of vehicles;
(d) RCW 46.61.502 or 46.61.504, relating to persons under the influence of intoxicating liquor or drugs;
(e) RCW 46.20.342, relating to driving a motor vehicle while operator's license is suspended or revoked;
(f) RCW 46.61.525, relating to operating a motor vehicle in a negligent manner.]

Under these statutes, custodial arrests for traffic violations are limited to situations involving:

1. The specific violations listed in RCW 10.31.100(3).
2. Refusal to sign the promise to appear in court under RCW 46.64.015(1),
3. Nonresident arrestees under RCW 46.64.015(3).

However, courts have followed the Hehman exception and allowed custodial arrest for minor traffic offenses when there are "other reasonable grounds" in addition to a minor traffic violation. In Reding, the court stated: "[T]he only time additional grounds are necessary for an arrest to be valid is when a minor traffic offense has been committed." The court cites as examples State v. Barajas, 57 Wn. App. 556 (failure to have a driver's license, alone, does not justify arrest), and State v. Watson, 56 Wn. App. 665 (failure to have a driver's license coupled with no identification and no proof of ownership justifies arrest), (1990).

Mr. Terrazas was arrested solely for driving without a license. At the time [the trooper] told Mr. Terrazas he was under arrest and placed him in custody, the trooper had no other grounds for arrest. [The trooper] testified at the suppression hearing:

Q: What was he arrested for?
A: Not having a driver's license.
Q: That's it? That's it, isn't it?
A: That's it.

Mr. Terrazas was never given an opportunity to sign a promise to appear; he was

> arrested as soon as he said he had no license. At the time [the trooper] placed Mr. Terrazas under arrest, he had no facts suggesting that Mr. Terrazas would not appear if cited and released. His mere suspicion that he had been given a false name is insufficient as other grounds to justify a custodial arrest. The trooper did not have dispatch run the name Juan Sandoval through the computer, did not inquire where the driver lived, did not inquire about the driver's connections to the community, and did not attempt to establish ownership of the vehicle before arresting Mr. Terrazas.

[Some citations omitted; LED Editor's Note in bold type inserted.]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **WOULD-BE FORGER WHO FAILS TO SIGN CHECK AS "DRAWER" CAN'T BE CONVICTED OF FORGERY** -- In State v. Smith (Alisa L.) 72 Wn. App. 237 (Div. II, 1993) the Court of Appeals rules that the following facts did not provide a basis for a forgery prosecution:

> Smith obtained a blank check belonging to her grandmother. Without her grandmother's authority, she filled in an amount, $225, in both numbers and letters. She also filled in her own name as payee. She endorsed the back of the check by signing her own name, Alisa Smith.
>
> On the face of the check, in the lower right-hand corner, there was a line for the signature of the drawer. Smith left that line blank.
>
> Smith cashed the unsigned check at a delicatessen. When the bank refused to honor it, the delicatessen's owner contacted Smith's grandmother. The grandmother identified the check as one of hers, but said she had not authorized anyone to write it. The police then interviewed Smith, who confessed to stealing her grandmother's checkbook and writing the check to obtain money for cocaine. Smith was charged with forgery, and a jury convicted her of that crime. Smith now appeals, alleging that the evidence is insufficient to support a conviction for forgery.

Noting that Ms. Smith may be guilty of other crimes, e.g., theft, the Court rejects this case as a "forgery" for two reasons. First, the Court declares that the general rule is that if one uses one's own name on a written instrument, one may not be charged with forgery. **[Compare this statement, however, to the analysis of the forgery statute in the Esquivel case digested above at page 8 (Esquivel involves a different fact situation and a different legal question and is not inconsistent with Smith, we believe). LED Ed.]** Second, the Smith Court points out that the common law rule of "legal efficacy" applies in forgery cases. That common law rule bars a forgery prosecution when a written instrument is so incomplete that it would lack legal effect in its incomplete form even if genuine. Such was the case with the check stolen by Smith, due to the absence of a "drawer's" signature on the front of the check. RCW 62A.3-401(1) provides that "no person is liable on an instrument unless his signature appears thereon". Therefore, the check was not of legal effect when Smith cashed it, the Court declares, and Smith could not be guilty of forgery.

Result: Mason County Superior Court conviction for forgery (one count) reversed; convictions for three other counts of forgery (under facts not addressed here) were affirmed.

(2) **SUPERVISOR-AUTHORIZED TAPE RECORDING OF DRUG DEAL ADMISSIBLE EVEN THOUGH THERE WAS NO EVIDENCE THAT POST-RECORDING JUDICIAL REVIEW WAS DONE** -- In State v. Moore, 70 Wn. App. 667 (Div. I, 1993) the Court of Appeals rejects defendant's argument that a tape recording of a drug deal should not have been admissible in evidence against him. Defendant's contention, the facts, and the tape recording admissibility issue are discussed by the Court of Appeals as follows:

> Moore contends the tape recording and transcript should have been excluded because the State failed to show that it complied with the statutory requirement of judicial review of the police officer's authorization of the recording. We disagree.
>
> RCW 9.73.230(8) controls. It provides in relevant part:
>
> > In any subsequent judicial proceeding, evidence obtained through the interception or recording of a conversation or communication pursuant to this section shall be admissible only if:
> > (a) The court finds that the requirements of subsection (1) of this section were met and the evidence is used in prosecuting an offense listed in subsection (1)(b) of this section[.]
>
> Subsection (1) sets forth the circumstances under which a conversation may be recorded with the consent of only one party thereto.
>
> Here, the requirements of subsection (1) were met and the tape recording was properly admitted. First, at least one party to the conversation, detective Rivera, consented to the recording, thus satisfying RCW 9.73.230(1)(a). Second, Rivera had probable cause to believe the conversation with Moore would involve "the unlawful manufacture, delivery, sale, or possession with intent to manufacture, deliver, or sell" cocaine. RCW 9.73.230(1)(b). Prior to the meeting between Rivera and Moore, Moore had called Rivera and said she and another person had $5,000 and wanted to buy cocaine. Moore agreed to purchase 4 ounces and she and Rivera agreed to meet in a parking lot on Aurora Avenue. From these facts, probable cause existed to believe that the conversation would involve the sale, possession, and/or delivery of cocaine.
>
> Third, Rivera complied with RCW 9.73.230(1)(c), which requires the completion of a written report pursuant to subjection (2). The report, State's exhibit 1, sets forth [t]he circumstances that meet the requirements of subsection (1). RCW 9.73.230(2)(a). That is, the report states that authorization was given by Captain Ferguson, who was above a first-line supervisor, that Rivera consented to the recording, and that probable cause existed as follows:
>
> > That on 3-24-90 at approx 2000 hrs I received a call from a female known to me as Nellie Hardman who stated she had a guy who wanted to buy some cocaine. I have had a on-going investigation on Nellie Hardman

> where I have been posing as a large quantity cocaine dealer. On this date it was agreed that I would sell her and her friend four ounces of cocaine for four thousand dollars. We then agreed to meet in the back parking lot of the K-Mart located at N 130th & Aurora Ave. N. at 2200 hrs where the exchange of money and cocaine will take place.
>
> Nellie Moore was also known as Nellie Hardman.
>
> The report contains the names of the authorizing and consenting parties, the names of the officers authorized to intercept, transmit, and record the conversation, and the identity of the persons who may commit the offense, in compliance with RCW 9.73.230(2)(b), (c), and (d). Also, the report provides the details of the offense "and the expected date, location, and approximate time of the conversation". RCW 9.73.230(2)(e). Finally, the report states that there had been no attempt to obtain authorization pursuant to RCW 9.73.090(2), in fulfillment of RCW 9.73.230(2)(f).
>
> The trial court properly found that the requirements of subsection (1) were met.
>
> Moore contends the tape recording was improperly admitted because, at the suppression hearing, the State failed to prove that it complied with subsections (6) and (7) which require the submission of the authorization to the court for judicial review. However, the plain language of subsection (8) requires only that the court find the requirements of subsection (1) were met, and does not require a finding that the requirements of either subsection (6) or (7) were met.

[Footnotes omitted]

Result: King County Superior Court conviction for possession of cocaine with intent to deliver affirmed.

LED EDITOR'S COMMENT: Even though this is not a State Supreme Court ruling on the court-review issue, we think it will stand up if reviewed by that Court. Nonetheless, we strongly recommend that agencies submit their "230" tapes for court review as required under the statute.

(3) **PURSE SEIZURE BASED ON PROBABLE CAUSE TO SEARCH IT HELD LAWFUL** -- In State v. Lund, 70 Wn. App. 437 (Div. II, 1993) the Court of Appeals reverses a trial court suppression order and holds that police with probable cause to search a purse for illegal drugs may lawfully seize and hold the purse while seeking a search warrant.

Pierce County deputy sheriffs had developed articulable, objective suspicion (based in part on an inmate's story) that a paralegal for a defense attorney was smuggling illegal drugs to inmates in the county jail. When the deputies stopped the suspect within the jail facility, and asked to talk to her, she spontaneously volunteered, "I guess you guys have been waiting for me." At that point, the deputies seized her purse with the intention of seeking a search warrant. First, however, they Mirandized the suspect and asked her if she had any drugs on her person. She said she did, reaching over and opening her purse to produce two baggies of marijuana.

The Court of Appeals holds that because the officers had probable cause to search Lund's purse when they seized it from her, they did not violate her rights in taking the purse. And, because her decision to reach in her purse and hand over the drugs was consensual or voluntary, the drug seizure was lawful, and the drugs were admissible as evidence against her.

Result: Pierce County Superior Court order suppressing the marijuana suppressed, case remanded for trial. Status: Lund's Petition for Review denied by State Supreme Court.

LED EDITOR'S COMMENT: In the course of a lengthy, multiply-footnoted opinion, the text of which, for space reasons, we have not shared with our readers, the Court of Appeals states and restates -- but does not explain -- its view that the deputies: (a) had probable cause to search the purse when they seized it, but (b) did not have probable cause to arrest Lund at that point. While it is true that in many circumstances PC to search an object or area is not PC to arrest a person connected with the object or area, we think one necessarily leads to the other under the categorical circumstances of this case. Maybe we missed something in reviewing this opinion, but we feel that if there was probable cause to believe that the purse contained illegal drugs, then there was probable cause to arrest Lund for illegal possession of those drugs. Maybe the Court is considering unknowing possession of illegal drugs in its "PC-to-arrest" analysis, but this is almost never a factor in PC analysis, and certainly not pertinent here. This question of "PC to arrest" vs. "PC to search" did not appear to be a focal point in the briefing of the parties to the Court of Appeals.

What we perceive to be a flawed distinction here (per the preceding paragraph) could be critical in a future case where the arrestee is not so helpful, and police search the purse at the moment of arrest without consent to do so. We think the law is clear in this situation. If police have PC to arrest, then the purse carried by the arrestee lawfully may be searched without a warrant incident to arrest. However, if police do not have PC to arrest, then, even though they have PC to search a purse, police need a search warrant or consent to justify a search of the purse. We hope that what we view as a misguided effort by the Court of Appeals to draw a distinction here in Lund does not lead to flawed analysis and bad results in future cases.

(4) **"TRANSFERRED INTENT" -- LEGAL FICTION DOESN'T SUPPLY PROOF OF INTENT AS TO BOTH INTENDED AND UNINTENDED VICTIMS FOR A SINGLE ACT** -- In State v. Wilson, 71 Wn. App. 880 (Div. II,1993) the Court of Appeals rules that the doctrine of "transferred intent," a legal fiction which allows the State to charge a person with intentional assault against an unintended victim where the assailant actually intended to injure another person, doesn't allow the state to charge intentional assaults as to both intended and unintended victims for a single act.

After being kicked out of a tavern for getting in a heated argument, Mark S. Wilson fired four shots through the plate glass window of the tavern, trying to injure certain persons inside with whom he had a dispute. His shots missed the intended victims and instead struck two unintended victims.

Wilson was charged with and convicted of first degree assault as to the two intended victims and with first degree assault as to two unintended victims; all of the charges were based on his intent to shoot particular people inside when he fired. The Court of Appeals reverses two of the convictions, holding that the transferred intent doctrine cannot be used in this manner. The Court explains as follows:

> The doctrine of transferred intent has been part of the Washington common law since 1896. **[Discussion of common law decisions follows. LED Ed.]** . . .
>
> . . .
>
> The doctrine of transferred intent was created to avoid the specific intent requirement and thus hold the defendant accountable for the consequences of his behavior when he injures an unintended victim. **[Discussion of a California decision follows. LED Ed.]** . . .
>
> The doctrine of transferred intent most often appears in homicide cases where someone other than the intended victim is killed as a result of the accused's poor aim. Typically, the facts support only one count of murder because the intended victim escapes fatal injury. In those cases, the courts apply a legal fiction to insure that the accused is punished to a degree commensurate with his level of mental culpability at the time of the offense. An assault is unlike a homicide case where death of the victim is the sine qua non of the offense. Varying consequences on the victim resulting from the accused's assaultive behavior may prove the elements of assault. As the jury instructions here indicate, an assault may be established if the accused's assaultive behavior creates apprehension and fear of bodily injury in the victim or an assault may be established if the accused's assaultive behavior results in the victim being struck or shot.
>
> Under the State's theory, Wilson committed first degree assault when, with intent to inflict great bodily harm on Jones and Judd, he assaulted them with a firearm by placing them in apprehension and fear of bodily injury, the actual infliction of such injury being unnecessary. The intent to inflict great bodily harm elevated the assault against Jones and Judd to assault in the first degree. Consequently, by holding Wilson accountable for this behavior, the State has exacted punishment commensurate with his level of mental culpability. There is no reason justifying use of the legal fiction known as transferred intent to prove that Wilson assaulted Hurles and Hensley in the first degree. The State tried, convicted, and sentenced Wilson for offenses against his intended victims, the seriousness of which was consistent with his state of mind. It was error for the trial court to allow proof of Wilson's intent to inflict great bodily harm against Jones and Judd to support charges of assault in the first degree against Jones and Judd and against Hurles and Hensley. [COURT'S FOOTNOTE: The State could have chosen to charge Wilson for the assaults against the unintended victims without using the theory of transferred intent, i.e., assault in the second degree.]

[Extensive text, citations omitted.]

Result: Kitsap County Superior Court convictions for first degree assault (two counts) reversed, other convictions for first degree assault affirmed; case remanded for resentencing.

(5) **"TRANSFERRED INTENT" -- MISSED SHOT SHATTERING WINDOW GLASS ON HOUSE CAUSING INJURY TO OCCUPANT WOULD SUPPORT ASSAULT 2 CONVICTION** -- In State v. Bland, 71 Wn. App. 345 (Div. I, 1993) the Court of Appeals reviews a situation where: (1)

defendant pointed a gun at a person on the street, expressly threatened to shoot him (I'll kill you boy if you don't give my chain back."), and caused him to be afraid he would be shot; and (2) as the first person was trying to get away, defendant then shot at and missed the first person with specific intent to assault that first person, but instead the bullet went through the window of a nearby residence and shards of glass struck a second person inside the residence. The Court of Appeals rules that under these facts defendant could lawfully be convicted of second degree assault as to both persons -- with the first conviction based on the threat (pointing the gun at the man on the street and expressly threatening to shot him), and the second conviction based on the battery (causing glass shards to strike the unintended victim in his house) coupled with a "transferred intent" theory.

In addressing the question of whether the shooter could be convicted of second degree assault as to the unintended second person under RCW 9A.36.021 on the theory that he assaulted another with a deadly weapon, the Court declares: (1) the intent of the shooter to hit victim A can be transferred by legal fiction into an intent to shoot the unintended victim B, and (2) the fact that glass shards struck the second person, even though they did him no bodily harm, would satisfy the assault element of the statute under the "battery" definition of assault. On this latter point, the Court explains that Washington has no statutory definition of "assault" and hence uses the following three alternative common law definitions of "assault":

> (1) an attempt, with unlawful force, to inflict bodily injury upon another [attempted battery]; (2) an unlawful touching with criminal intent [actual battery]; [or] (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm [common law assault].

Result: King County Superior Court conviction of second degree assault (while armed with a deadly weapon) as to original (intended) victim affirmed after review of an issue not addressed here; conviction of second degree assault as to unintended victim reversed on jury instruction/verdict form issue also not addressed here; Bland also had pleaded guilty to second degree reckless endangerment as to the latter victim and this plea was not challenged on appeal.

LED EDITOR'S COMMENT: While the Court in Bland did not discuss the issue addressed in the immediately preceding LED entry re State v. Wilson, we believe that the two cases are not inconsistent. In Bland, the State did not base the assault prosecution as to the intended victim on the single act of shooting the gun, as it had in Wilson. Rather, in Bland, the assault of the first (intended) victim was complete with the combined preshooting acts of: (a) pointing the gun, (b) threatening the victim, and (c) putting him in fear. A second and separate act of assault occurred in Bland when defendant Bland fired the gun at his intended victim and inadvertently caused glass shards to strike a second, unintended victim. The Bland situation thus is distinguishable factually from Wilson. In Wilson defendant Wilson did not commit a separate act of threatening the intended victims with the gun; rather, Wilson's only act of assault occurred when he fired shots into the tavern.

(6) **BROAD-BASED CHALLENGE TO LICENSE REVOCATION UNDER IMPLIED CONSENT LAW FAILS; DEFICIENCIES IN OFFICER'S REPORT TO DOL CURED WHERE HE APPEARED AND TESTIFIED IN SUPERIOR COURT HEARING** -- In Johnson v. Dept. of Licensing, 71 Wn. App. 326 (Div. II, 1993) the Court of Appeals rejects a driver's several challenges to the revocation of his driver's license under the "implied consent" law (RCW 46.20.308). The Court holds, among other things, as follows: (1) There is no requirement under

RCW 46.20.308 (the implied consent statute) that a person be informed of the duration of the revocation of the person's driver's license attendant to a refusal to submit to a breath alcohol test or of the availability of an occupational driving permit. (2) An earlier request (by a police officer during field sobriety tests) that a driver submit to a breath alcohol test, which request was not preceded by the warning required under RCW 46.20.308, does not invalidate a later request (at the stationhouse) which does warn of the consequences of refusing the test. (3) Asking a driver to "submit" to a breath test is equivalent to "requesting" the driver to take the test for purposes of RCW 46.20.308. (4) Any technical deficiencies in a police officer's report of a driver's refusal to take a breath alcohol test are irrelevant when the officer testifies at the de novo superior court trial on review of the revocation of the driver's license to drive.

Result: affirmance of Clallam County Superior Court order sustaining DOL's revocation of Jerry N. Johnson's driver's license.

(7) **IMPLIED CONSENT WARNINGS -- COURT ADDRESSES PROCEDURE FOR SHOWING INDIGENCY IN RELATION TO THE RIGHT TO A SECOND BREATH TEST** -- In State v. Berkley, 72 Wn. App. 12 (Div. I, 1993) the Court of Appeals addresses procedures to be followed in trial court to determine if a DWI defendant was indigent at the time of arrest. Such procedures to determine indigency are necessary where an officer has correctly informed the defendant at the time of arrest that he or she has a right to a second breath test, but the officer has incorrectly advised the indigent arrestee that the test is available at the arrestee's own expense. The Court of Appeals had two separate cases before it -- that of Heather Berkley and that of Roger Pablo -- the cases raised the same issue and were therefore consolidated for appeal purposes.

[LED EDITOR'S NOTE: The requirement that the officer not tell an indigent arrestee that he has to pay for a second test arises out of the State Supreme Court decision in State v.Bartels, 112 Wn.2d 882 (1989) Sept. '89 LED:16. The facts in Berkley and Pablo arose before Bartels was announced by the State Supreme Court; presumably, Washington law enforcement agencies are no longer using the "at your own expense" language in their implied consent warnings.]

At the hearing to determine whether defendant was indigent at the time of his arrest, defendant refused to testify. The Court of Appeals rejects the State's argument in Berkley that defendant had no Fifth Amendment right to refuse to testify in regard to his financial status at the time of arrest. Defendant has the right to refuse to testify in this proceeding. However, the burden on the State to prove financial ability is not great, as the Court of Appeals explains:

> To discharge its burden, the State is, of course, entitled to offer any other relevant evidence as to the defendants' financial ability to obtain the additional test. The State's evidence that an additional blood test could be secured for the sum of $14 is not challenged. The court can take judicial notice that most people in our society either have or can easily secure the sum of $14. Absent any affirmative showing of indigency by the defendant through his testimony, or otherwise, only slight evidence is required to permit the court to make a finding that the defendant is financially able to secure the test. Pablo admitted to the arresting officer that he had been working that day and was a registered owner of the truck he was driving. At Berkley's trial, the officer testified that she [Berkley] was employed at Providence Hospital as a pharmacist assistant and was the registered owner of the car she was driving. Unrebutted, this information would have permitted the trial

court to make a finding that the defendants were able to pay for the additional test and, hence, the breath test results were admissible.

However, neither of the District Courts chose to make a finding as to the defendants' financial ability to obtain the additional test based on this evidence and that therefore the breath tests were admissible. We decline to make such a finding at the appellate level. On remand the District Court should make a finding as to whether the State's evidence is sufficient to establish the defendants' ability to pay for the additional test without any consideration of the defendants' refusal to testify. At such hearing, the defendants should be offered an opportunity to present evidence to rebut the compelling inference of their ability to pay. A retrial on the merits is necessary only if either defendant is found to have been unable to pay for the test at the time of arrest. At such a trial the breath test evidence would be excluded.

Result: Snohomish County Superior Court decisions setting aside Everett District Court DWI convictions of Heather Berkley and Roger Pablo reversed in part, and both cases remanded to District Court for further hearings on the issue of indigency.

(8) **CITY FIREARMS DISCHARGE ORDINANCE WITHIN EXCEPTION TO PREEMPTION CLAUSE OF STATE FIREARMS STATUTE** -- In Seattle v. Ballsmider, 71 Wn. App. 159 (Div. I, 1993) the Court of Appeals rejects defendant's argument that a City of Seattle ordinance prohibiting discharging a firearm (SMC 12A.28.050) violates the preemption clause of the state firearms law (RCW 9.41.290). Subsection 1 of RCW 9.41.290 is written quite broadly to preempt local firearms ordinances as follows:

> The state of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state, including the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms, or any other element relating to firearms or parts thereof, including ammunition and reloader components. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law and are consistent with this chapter. Such local ordinances shall have the same or lesser penalty as provided by state law. Local laws and ordinances that are inconsistent with, more restrictive than, or exceed the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of such city, town, county, or municipality.

The Ballsmider Court holds that Seattle's ordinance falls squarely within the exception to preemption found in RCW 9.41.300(2)(a), which exception provides:

> (2) *Notwithstanding RCW 9.41.290,* cities, towns, counties, and other municipalities may enact laws and ordinances:
> (a) Restricting the discharge of firearms in any portion of their respective jurisdictions where there is a reasonable likelihood that humans, domestic animals, or property will be jeopardized. Such laws and ordinances shall not abridge the right of the individual guaranteed by Article I, section 24 of the state Constitution to bear arms in defense of self or others; and . . ..

Because the ordinance comes within the exception of RCW 9.41.300(2)(a), the ordinance lawfully may have a greater penalty than prescribed by state statute, the Court holds.

Result: King County Superior Court affirmance of Seattle Municipal Court conviction affirmed.

(9) **FREE SPEECH -- SEATTLE'S "COERCION" ORDINANCE UNCONSTITUTIONALLY OVERBROAD** -- In Seattle v. Ivan, 71 Wn. App. 145 (Div. I, 1993) the Court of Appeals holds that the City of Seattle's coercion ordinance (SMC 12A.06.090) is unconstitutionally overbroad because its definition of "threat" unreasonably extends to speech protected by the First Amendment. In striking down the ordinance, the Court: (1) declines the City's invitation to read a special intent provision into the ordinance, and (2) refuses to sever the unconstitutional portions of the ordinance under its severability clause. Result: affirmance of King County Superior Court ruling reversing Seattle Municipal Court conviction for attempted coercion.

LED EDITOR'S COMMENT: The Court points out in a footnote in Ivan that the Seattle "coercion" ordinance is much broader in its definition of "threat" than is the State statute at RCW 9A.36.070 and RCW 9A.04.110(25)(a) - (c). It is the failure of the Seattle ordinance to more narrowly define "threat" that invalidates the ordinance. For this reason, we believe that the Ivan ruling does not support a challenge to the state coercion law or any other Title 9A RCW crime containing a "threat" element.

(10) **RESTITUTION ORDER FOLLOWING NEGLIGENT DRIVING CONVICTION LAWFUL, EVEN THOUGH INSURANCE PAYMENTS ALSO HAD COMPENSATED ACCIDENT VICTIM** -- In State v. Shannahan, 69 Wn. App. 512 (1993) the Court of Appeals rejects defendant's appeal from a trial court restitution order which was issued under the following circumstances (as described by the Court of Appeals):

> Shannahan was charged by information filed on October 16, 1990, with vehicular assault pursuant to RCW 46.61.522. The charge stemmed from an automobile accident on October 14, 1990, in which Shannahan's vehicle collided with a vehicle driven by Rebecca Kunz. Kunz suffered extensive head and brain injuries and is currently disabled. The investigating officer noticed that Shannahan had bloodshot eyes, was slurring his speech, and had an odor of alcohol on his breath. The officer placed Shannahan under arrest for vehicular assault and drew blood from him. Shannahan's blood alcohol level was .09.
>
> A jury found Shannahan guilty of the lesser included offense of negligent driving in violation of RCW 46.61.525. At the request of the State, the court offered Shannahan to pay restitution in the amount of $11,137.86, in monthly payments of $100. Shannahan's insurance carrier paid $25,000, the limits of the policy, to Kunz.

The Court of Appeals rejects three alternative challenges defendant proffered against the restitution order. First, he argued that the traffic code does not permit restitution orders, only fines and imprisonment. However, the Court of Appeals points out that RCW 9A.04.090 generally makes applicable to all criminal sections throughout the RCW's the provisions of chapters 9A.04 through 9A.28 RCW; hence, the restitution authorization at RCW 9A.20.030 applies to punishment of a crime such as negligent driving under Title 46 RCW.

Second, defendant argued that his victim had received full compensation for her injuries from his insurance carrier. The Court of Appeals rules, however, that the trial court had discretionary authority to require further payments to the victim despite payment by another source, in whole or in part, for her damages.

Third, defendant argued that the restitution order would result in the victim receiving more than 100% of the actual economic loss that she had suffered. Noting that the law allows restitution orders to be in amounts up to double a victim's loss, the Court of Appeals summarily rejects this argument.

Result: King County Superior Court restitution order on negligent driving conviction affirmed.

(11) **JUVENILE COURT MAY ORDER RESTITUTION BY DEFENDANT FOR DAMAGES CAUSED BY HIS CO-PARTICIPANT IN JUVENILE OFFENSE** -- In State v. Hunotte, 69 Wn. App. 670 (Div. II, 1993) the Court of Appeals upholds a juvenile court restitution order following a juvenile offender adjudication based on accomplice liability. The juvenile, David A. Hunotte objected that most of the damages for which Hunotte had been ordered to pay restitution had been caused primarily by the acts of his accomplice. The Court holds that under RCW 13.40.190(1) a juvenile offender in Hunotte's situation may be ordered to make restitution to the victim regardless of which participant actually caused any specific part of the victim's loss. Result: Pierce County Superior Court restitution order affirmed.

(12) **EMBEZZLER MUST PAY EMPLOYER'S COST OF REVIEWING BUSINESS RECORDS WHERE REVIEW NECESSARY TO INVESTIGATE THE EMBEZZLEMENT** -- In State v. Johnson, 69 Wn. App. 189 (Div. I, 1993) the Court holds that an employer was entitled to restitution of $2700, which is the amount the employer paid to friends and family to check the employer's books after he learned that defendant, the employer's bookkeeper/office manager, had been embezzling money from him. Defendant had argued, among other things, that she should not have to pay the costs of reviewing the books because: (1) the family members and friends reviewing the records were not qualified to review the books properly, and (2) that the employer was not legally obligated to pay the family members and friends. The Court of Appeals rejects her challenges and holds that there is broad discretion in the trial court to fashion a reasonable restitution order, and that this order was not an abuse of discretion.

Result: Snohomish County Superior Court restitution order on conviction for first degree theft affirmed in the part discussed here; other elements of the restitution order not addressed in this LED entry are reversed.

(13) **EVIDENCE RULE 609(a)(2) -- "JOYRIDING" IS A CRIME OF DISHONESTY, AND HENCE EVIDENCE RE: JOYRIDING CONVICTION IS PER SE ADMISSIBLE TO IMPEACH WITNESS** -- In State v. Trepanier, 71 Wn. App. 382 (Div. I, 1993) the Court of Appeals holds that the crime of taking a motor vehicle without permission (RCW 9A.56.070), whether committed by taking the vehicle or by riding in the vehicle with the knowledge that it was unlawfully taken, involves dishonesty. Accordingly, a conviction for joyriding, like a conviction for the crime of theft, is per se admissible to impeach a witness under ER 609(a)(2).

Result: Snohomish County Superior Court convictions for taking a motor vehicle without permission (one count) and attempted first degree theft (four counts) affirmed.

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NEXT MONTH

The June LED will include Part I of 1994 Washington Legislation (most enactments from the 1994 Legislative session take effect on June 9, 1994). Other LED entries will include two recent State Supreme Court decisions -- **State v. Corliss**, No. 59905-0 (a unanimous decision dated March 24, 1994, affirming a Court of Appeals decision -- see 67 Wn. App. 708 (Div. I, 1992) reported at March '93 LED:12 -- the Supreme Court rules in Corliss that police may listen in on a shared phone receiver or on an extension phone without violating statutory or constitutional privacy provisions); and **State v. Hill**, No. 60193-3 (a 7-2 decision dated March 17, 1994, reversing a Court of Appeals decision -- see 68 Wn. App. 253 (Div. I 1992) reported as State v. Lee at April '93 LED:10 -- the Supreme Court rules in Hill that, when executing a narcotics search warrant, police may search pants found lying on the floor, even if a pants-less resident of the premises says, during the course of the search, that he wants to put on those particular pants).

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